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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 21 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Review of the Commission's Regulations)
Governing Television Broadcasting)

MM Docket No. 91-221

Television Satellite Stations Review of)
of Policy and Rules)

MM Docket No. 87-8

Review of the Commission's Regulations)
Governing Attribution of Broadcast)
and Cable/MDS Interests)

MM Docket No. 94-150

Review of the Commission's Regulations and)
Policies Affecting Investment)
in the Broadcast Industry)

MM Docket No. 92-51

Reexamination of the Commission's)
Cross-Interest Policy)

MM Docket No. 87-154

Broadcast Television National Ownership Rules)

MM Docket No. 96-222

To: The Commission

REPLY COMMENTS OF
MT. MANSFIELD TELEVISION, INC.

Mt. Mansfield Television, Inc. ("Mt. Mansfield"), the licensee of WCAX-TV, Channel 3, Burlington, Vermont, respectfully submits these reply comments in the above-captioned proceedings.^{1/}

^{1/} While Mt. Mansfield's comments address directly issues covered in Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rulemaking, FCC 96-438 (rel. Nov. 7, 1996) ("Second FNPRM"), they are also relevant to certain issues in the related and concurrent proceedings captioned above and thus are

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Mt. Mansfield provides service to the Burlington, VT-Plattsburgh, NY market. This market ranks 91st and has approximately 290,000 Nielsen DMA households. Mt. Mansfield is a CBS affiliate and also broadcasts certain Fox programming. Only three other commercial stations currently serve this market. US Broadcast Group owns ABC affiliate WVNY, also licensed to Burlington. Heritage Media ("Heritage") owns NBC affiliate WPTZ, licensed to North Pole, New York. Heritage also owns a satellite station, WNNE, licensed to Hartford, Vermont, which also broadcasts NBC programming. In addition, Heritage has a Time Brokerage Agreement and a "Broadcast Facilities Agreement" with WFFF, Channel 44, a permittee that is not yet operational.^{2/} While most of the terms of these agreements have not been filed with the Commission, they appear to include the type of LMA that is a subject of these proceedings.^{3/}

As the Commission has recognized,^{4/} generic rules applicable to larger television markets may be inadequate to the task of ensuring diversity and competition in smaller markets such as Burlington-Plattsburgh. A number of commenters have raised such concerns in these

also being filed by the Commission in those dockets. See Television Ownership and Attribution Rulemaking Proceedings, Public Notice, DA 97-507 (rel. Mar. 10, 1997).

^{2/} See FCC File No. BAPCT-9605131A.

^{3/} See *id.*, Letter from Richard J. Bodorff to William F. Caton, July 17, 1996 (identifying "LMA with Heritage").

^{4/} See, e.g., Second FNPRM at ¶ 53 (requests comments on whether duopoly rule waivers should be limited to only the largest markets); *id.* at ¶ 88 (reserves right to invalidate otherwise grandfathered LMAs that raise particular competition and diversity concerns, such as might be presented in very small markets); Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3580 (1995) ("TV Ownership Further Notice") (with respect to relaxation of one to a market rule, caution is warranted in taking any action that could reduce diversity, particularly in smaller markets).

proceedings.^{5/} Others have proposed automatic exceptions, but only for larger markets.^{6/} Mt. Mansfield similarly urges the Commission to ensure that any duopoly waiver policy adopted herein preserves its ability to address small market concerns in specific cases. As Jet argues, "in small markets, the public interest, preserved through competition and diversity of viewpoints, suffers immensely if a single entity is permitted to operate one half or more of the market's stations."^{7/} Another telling example described in the comments is the Salinas-Monterey, CA market. This market ranks 122nd and has only four licensees, one of which is an affiliate of Univision. When two of these four licensees entered into an LMA in April 1996, a single entity thus began providing programming to two of the three English language stations serving the market.^{8/} As Commissioner Ness has appropriately warned, this situation "brings into sharp focus how duopolies or LMAs can diminish diversity in television station ownership."^{9/}

As the National Association of Broadcasters notes, "there will be some markets and some proposed combinations of stations where the particular circumstances of the transaction may

^{5/} See Comments of Frances Dillard at 2; Comments of Jet Broadcasting Co., Inc. at 9-13; Comments of Cynthia L. McGillen and James P. McGillen at 3.

^{6/} See, e.g., Comments of BET Holdings, Inc. (MM Docket No. 94-150) at 7 (waiver only in top 25 markets if there would be at least 30 independently owned broadcast voices); Comments of Glenwood Communications Corp. at 5 (overlapping city grade waiver only in top 10 markets); Comments of Granite Broadcasting Corp. at 9 (presumptive waiver where there are at least 30 independent and competing media voices).

^{7/} See Comments of Jet Broadcasting Co., Inc. at 12.

^{8/} See Comments of Cynthia L. McGillen and James P. McGillen at 2.

^{9/} Broadcasting & Cable, May 20, 1996, at 22; see also Remarks of Commissioner Susan Ness Before the Texas Association of Broadcasters, Sept. 30, 1995, at 4.

present a risk to the public interest.”^{10/} In view of the foregoing concerns, Mt. Mansfield urges the Commission to conduct a multi-factor analysis in evaluating waiver requests for small markets such as Burlington-Plattsburgh. First, the analysis should examine the number of existing commercial stations in the market. As the Commission has recognized, “it is necessary to consider the number of independent suppliers serving the market,” and it may be appropriate “to consider consolidations only where a minimum number of separately owned television stations would remain after the proposed combination, (e.g., a minimum of six independently owned stations).”^{11/} Second, the analysis should consider whether the waiver applicant already has access to more than one outlet, including satellites, and the extent to which any such outlets provide nonduplicative programming. Finally, as in all such waiver cases,^{12/} the waiver analysis should include a determination of the extent of any proposed public interest benefits that would not otherwise be available. A duopoly that would merely consolidate established network outlets, for example, should be presumptively disfavored.

In television as in radio, these concerns should be no less applicable to LMAs. The Commission appropriately notes that it “reserve[s] the right . . . to invalidate an otherwise grandfathered LMA in circumstances that raise particular competition and diversity concerns, such as those that might be presented in very small markets.”^{13/} While there may well be

^{10/} NAB Comments at 12 (urging case-by-case approach rather than bright line rule based on market size).

^{11/} TV Ownership Further Notice at 3575-76.

^{12/} See, e.g., Capital Cities/ABC, Inc., 11 FCC Rcd 5847, 5908 (1996) (separate statement of Chairman Reed E. Hundt) (Commission traditionally relies on showing of public interest benefits in granting ownership waivers).

^{13/} Second FNPRM at ¶ 88.

legitimate reliance interests at stake in cases where LMA operations are already in effect, in each such case the Commission should balance the particular competition and diversity concerns raised by LMAs against the degree of legitimate reliance interests demonstrated by the parties. We note in this regard that the Commission made very clear, in its notice adopted December 15, 1994, that parties to LMAs entered after that date might no longer be able to rely on nonattribution.^{14/}

A number of commenters suggest that, contrary to the Commission's view, the Telecommunications Act of 1996 and its legislative history require grandfathering the nonattribution of television LMAs entered into prior to that Act.^{15/} The text of the statute does not support their argument. Section 202(g) of the statute says only that nothing (i) in the new Act should be construed (ii) to “prohibit” television LMAs that are (iii) “in compliance with the regulations of the Commission.” This language certainly does not prevent the Commission from exercising its own discretion to prohibit LMAs, but in any event attribution does not “prohibit” LMAs. Moreover, the conference committee cannot grant rights not conferred by the statute

^{14/} At that time, the Commission proposed “counting the brokered station toward the brokering licensee's national and local ownership limits” and grandfathering LMAs “entered into prior to the adoption date of [that] Notice.” TV Ownership Further Notice at 3583-84. Mt. Mansfield and the permittee of WFFF, for example, were fully aware of the possible attribution of LMAs when in early 1995 they briefly considered the possibility of entering into an agreement to finance construction of WFFF, which ultimately never materialized.

^{15/} See Second FNPRM at ¶ 85; e.g., Comments of Association of Local Television Stations at 33-35; Comments of Blade Communications at 18; Comments of Paxson Communications Corp. at 34-35.

itself, the plain language of which clearly governs here: “[W]e are a Government of laws, not of committee reports.”^{16/}

In the event the Commission does decide to grandfather nonattribution of all LMAs, however, it should adopt the suggestion in the Notice to limit nonattribution to a period of no more than three years from the date of execution of the agreement, at least in small markets such as Burlington-Plattsburgh.^{17/} Some commenters propose even shorter periods.^{18/} Such a rule would minimize the risk that LMAs, as with duopolies, could undermine the public interest in broadcast competition and diversity^{19/} and would balance any legitimate reliance interest against these important public policies applicable in such markets.

^{16/} Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring); *see also* Chicago v. Environmental Defense Fund, 511 U.S. 328, 337 (1994) (statute, not committee report, is the authoritative expression of the law); Penna. R.R. Co. v. International Coal Co., 230 U.S. 184 (1912) (impermissible to resort to Conference Committee reports for the purpose of construing a statute contrary to its plain terms). The Conference Report also speaks in terms of “depriving the public of the benefits” of LMAs “currently in existence.” H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 163 (1996). Thus, the conferees appear to have been concerned about potential disruption of ongoing service. Where the brokered station is not yet operational, this concern would not appear to be applicable.

^{17/} *See* Second FNPRM at ¶ 91.

^{18/} *See* Comments of BET Holdings Inc. (MM Docket No. 91-221) at 4 (24-month transition period where necessary); Comments of Centennial Communications, Inc. at 10 (two years); Comments of Press Broadcasting Company, Inc. at 5 (one year after adoption of local ownership rules); Comments of Saga Communications, Inc. at 11 (six months).

^{19/} *See* Revision of Radio Rules and Policy, Report & Order, 7 FCC Rcd 2755, 2788 (1992) (rationale for imposing certain limits on time brokerage agreements).

Conclusion

For the foregoing reasons, the Commission should conduct a multi-factor analysis in evaluating both duopoly waiver requests and attribution of LMAs in small markets.

Respectfully submitted,

MT. MANSFIELD TELEVISION, INC.

A handwritten signature in dark ink, appearing to read "Peter R. Martin", is written over a horizontal line.

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